

# **WEBINAR WEDNESDAYS**



**Wednesday, February 10, 2021**

## **Addressing Sexual & Domestic Violence: Disarming BATTERERS**

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EXECUTIVE DIRECTOR

**In re the Matter of: MARY LEE ROZUM, Petitioner/Appellee,**

**v.**

**RICHARD DAVID ROZUM, Respondent/Appellant.**

**No. 1 CA-CV 14-0734 FC**

**Court of Appeals of Arizona, First Division**

**December 22, 2015**

Not for Publication – Rule 111(c), Rules of the Arizona Supreme Court

Appeal from the Superior Court in Maricopa County No. FN2014-092173 The Honorable

Richard J. Hinz, Judge Pro Tempore

Mary Lee Rozum, Mesa Petitioner/Appellee.

Charity Clark Law PLLC, Chandler By Charity Clark Counsel for Respondent/Appellant.

Presiding Judge Kenton D. Jones delivered the decision of the Court, in which Judge Samuel A. Thumma and Judge Peter B. Swann joined.

**MEMORANDUM DECISION**

JONES, JUDGE.

¶1 Richard Rozum appeals the superior court's order affirming an order of protection and restricting his access to firearms for the duration of the order of protection. For the following reasons, we affirm.

**FACTS<sup>[1]</sup> AND PROCEDURAL HISTORY**

¶2 In May 2014, Mary filed a petition with the superior court requesting an order of protection against her son, Richard. In her petition, Mary listed three encounters with Richard to support her request.

¶3 The first occurred in October 2013 when Richard was at Mary's home and a disagreement arose regarding money, ultimately resulting in Mary calling the police. Mary reported Richard had threatened she would never see her grandchildren again. The second occurred later in October when Richard, his wife, and his children visited Mary unexpectedly to move a gun safe stored in Mary's home. According to Mary, another disagreement about money arose, this time between her, Richard, and Richard's wife while Richard had a gun holstered at his side. On that occasion, Richard allegedly made threats that Mary "was going to pay." The third occurred in December 2013 when Mary brought presents to Richard's house for Mary's grandchildren. Richard, who later testified he had ordered Mary not to come onto his property, purportedly confronted Mary, threw her into a wall, and threatened to shoot her. Mary also generally averred Richard had, on multiple occasions in the past, threatened to kill her and that there had been "multiple situations of violence and threats."

¶4 The superior court granted Mary's petition for an order of protection against Richard in May 2014. Richard challenged the order, and the court held a contested hearing in September 2014. After receiving evidence and testimony, the court found, by a preponderance of the evidence, reasonable cause to believe Richard had committed an act of domestic violence against Mary during the December 2013 encounter and there was a risk of future domestic violence. On those bases, the court upheld the order of protection. The court also notified Richard that he was

"prohibited pursuant to the Brady Act from possessing any firearms during the period of time the protection order is in place" and ordered he turn his firearms over to local law enforcement.<sup>[2]</sup>

¶5 Richard timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) and -2101(A)(1),<sup>[3]</sup> and Arizona Rules of Protective Order Procedure 9(A)(2), (B)(2).<sup>[4]</sup>

## DISCUSSION

¶6 Richard argues the superior court erred both in affirming the order of protection and restricting his access to firearms. We review an order of protection for an abuse of discretion. *Savord*, 235 Ariz. at 259, ¶ 10 (citing *Cardoso*, 230 Ariz. at 619, ¶¶ 15-16). An abuse of discretion occurs when the court "makes an error of law in reaching a discretionary conclusion or 'when the record . . . is devoid of competent evidence to support the decision.'" *Id.* (citing *Mahar*, 230 Ariz. at 534, ¶ 14). We review the application of both Arizona and federal law *de novo*. *Mahar*, 230 Ariz. at 534, ¶ 14 (quoting *Bell v. Smitty's Super Valu, Inc.*, 183 Ariz. 66, 67 n.1 (App. 1995)).

### I. Order of Protection

¶7 Richard first argues the testimony of Mary and her witness to the December 2013 encounter was insufficient to support a finding of domestic violence. We disagree.

¶8 At the hearing, Mary and a second witness testified Richard grabbed Mary and pushed her against a wall. The court found Richard's conduct constituted an assault against a parent - a statutorily enumerated act of domestic violence. See A.R.S. §§ 13-1203(A), -3601(A)(4). The court need not have concluded an act of domestic violence *actually* occurred before issuing an order of protection, but only that there was "reasonable cause to believe" the defendant has or may commit an act of domestic violence against someone "related to the defendant." A.R.S. §§ 13-3601(A)(4), -3602(E) (emphasis added); see also *Mahar*, 230 Ariz. at 534, ¶ 15. The testimony at the hearing supports a reasonable belief both that Richard actually committed an act of domestic violence against Mary in December 2013 and that he may commit an act of domestic violence against Mary in the future.

¶9 Richard also argues he could not have committed an act of domestic violence because, he contends, Mary "committed criminal trespass" when she "entered the property" against his prior direction. Although the use of physical force in defense of premises or property may be a justification defense in a prosecution for a criminal offense, see A.R.S. §§ 13-401(B), -407(A), -408, a petition for a protective order initiates a separate *civil* proceeding. In this context, it does not matter who initiated the encounter. As discussed above, the superior court need only have reasonable cause to believe Richard committed an act of domestic violence in the past year or may commit an act of domestic violence against Mary in the future. The evidence supports the court's findings, and therefore the court did not abuse its discretion.

### II. Firearms Restriction

¶10 Richard next argues the superior court was not authorized to restrict his access to firearms because it did not specifically ask Mary about his use of or access to firearms for the purpose of "determin[ing] if the defendant poses a credible threat to the physical safety of the plaintiff." Ariz. R. Protective Order P. 6(C)(5)(d)(1). Contrary to Richard's assertion, the record reflects the court specifically asked Mary whether Richard threatened Mary with or otherwise referenced a gun.

And, Mary volunteered information regarding Richard's threatened use of and access to guns; specifically, she testified Richard had threatened to shoot her, had access to a gun safe with multiple firearms, and wore a gun on his hip. Furthermore, the court found Richard "pose[d] a credible threat to the physical safety" of Mary by concluding there existed a "threat of domestic violence - or, risk of domestic violence in the future."

¶11 Richard also argues the firearms restriction was imposed in error because the relevant provisions of the Brady Act only apply to a defendant who "poses a credible threat to the physical safety of [an] intimate partner or child." See 18 U.S.C. § 922(g)(8)(C)(i). He disputes his relationship with Mary qualifies under the plain meaning of the term. However, "intimate partner" is defined within 18 U.S.C. § 921(a)(32) as "the spouse of the [defendant], a former spouse of the [defendant], an individual who is a parent of a child of the [defendant], and an individual who cohabitates or has cohabited with the [defendant]." Richard does not dispute cohabitation, and Mary's testimony that Richard had lived with her provides ample support for the court's implicit conclusion that Richard's relationship with Mary falls within the Brady Act's definition of "intimate partner." See *State v. Pena*, 235 Ariz. 277, 279, ¶ 6 (2014) (noting courts apply dictionary definitions only where statutory definitions are absent). Accepting the statutory definition, the court properly imposed the firearm restriction after finding Richard posed a credible threat to Mary's physical safety.

¶12 Moreover, although the superior court's order restricting Richard's access to firearms was based on federal law, the restriction was also justified under Arizona law.<sup>[5]</sup> See *Michaelson v. Garr*, 234 Ariz. 542, 545 n.8, ¶ 11 (App. 2014) (declining to consider appellant's argument that he was not an "intimate partner" within the meaning of the Brady Act where an order restricting firearms was valid under Arizona law). Under Arizona law, the court may restrict a defendant's access to firearms as part of a protective order regardless of the parties' relationship if, as here, "the court finds that the defendant is a credible threat to the physical safety of the plaintiff." A.R.S. § 13-3602(G)(4); see also *Michaelson*, 234 Ariz. at 545, ¶ 12. We therefore find the court acted within its discretion in restricting Richard's access to firearms under both federal and state law.

## CONCLUSION

¶13 The superior court's order is affirmed.

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Notes:

[1] We view the facts in the light most favorable to upholding the superior court's order. *Savord v. Morton*, 235 Ariz. 256, 259, ¶ 10 (App. 2014) (quoting *Mahar v. Acuna*, 230 Ariz. 530, 534, ¶ 14 (App. 2012)).

[2] The federal Brady Handgun Violence Prevention Act (Brady Act), codified within Title 18, Chapter 44 of the United States Code, provides, in relevant part, that "[i]t shall be unlawful for any person . . . who is subject to a court order that . . . restrains such person from harassing, stalking or threatening an intimate partner of such person . . . or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner . . . and includes a finding that such person represents a credible threat to the physical safety of such intimate partner . . . to . . . possess . . . any firearm or ammunition." 18 U.S.C. 922(g) (2015).

[3] Absent material changes from the relevant date, we cite a statute's current version.

[4] The order of protection expired in May 2015. Although we will generally dismiss an appeal as moot when circumstances have changed such that our action will have no effect on the parties, *see, e.g., Exodyne Props., Inc. v. City of Phx.*, 165 Ariz. 373, 376 (App. 1990), we address the merits of this appeal because the issuance of an order of protection can "significantly harm the defendant's reputation - a collateral consequence that can have lasting prejudice, " even after the order's natural expiration, *Cardoso v. Soldo*, 230 Ariz. 614, 618-19, ¶¶ 12, 14 (App. 2012) (holding expired orders of protection are not moot for purposes of appellate review).

[5] We note our concern that the "Notice to Sheriff of Brady Indicators" provided to and used by the courts pursuant to Administrative Directive No. 2013-03 only references federal law and does not permit the court to indicate broader state law grounds for the firearm restriction. As explained in our decision, federal and state law grounds for restricting firearms are distinct and not interchangeable. Furthermore, the notice incorrectly defines "intimate partner" as "the spouse of a person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who lives or has lived in an intimate relationship with the person." *Compare with* 18 U.S.C. § 921(a)(32).

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